

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Eighteenth Region

OUTDOOR REPLACEMENT LIGHTING, INC.

Employer

and

IBEW, LOCAL UNION 292

Petitioner

Case 18-RC-17237

**HEARING OFFICER'S REPORT AND
RECOMMENDATION ON CHALLENGED BALLOTS**

Pursuant to a petition filed on March 8, 2004¹, and a Stipulated Election Agreement executed by the parties and approved by the Regional Director on March 17, an election by secret ballot was conducted on April 19, among certain employees of the Employer.² The results of the election are set forth in the Tally of Ballots which issued at the conclusion of the election.³ The challenged ballots are sufficient to affect

¹ Unless otherwise indicated, all dates are in 2004.

² The stipulated unit is as follows:

All full-time and regular part-time electricians and laborers employed by the Employer out of its Minneapolis, Minnesota facility; excluding sales employees, managerial employees, business office clerical employees, and guards and supervisors as defined in the Act.

³

Approximate number of eligible voters	2
Void ballots	0
Votes cast for Petitioner	0
Votes cast against participating labor organization	2
Number of valid votes counted	2
Challenged ballots	5
Valid votes counted plus challenged ballots	7

the results of the election. No objections were filed to conduct affecting the results of the election.

On May 27, the Acting Regional Director issued a Report on Challenged Ballots, Order Approving Stipulation on Certain Challenges, and Order Directing Hearing and Notice of Hearing in which he approved a Stipulation the parties entered into in which they agreed that the challenges to the ballots of Travis Gast and Aaron Olson should be sustained, and ordered that a hearing be held to resolve the issues raised by the challenged ballots of Douglas Delzer, Michael Heimerl and Joseph Prehall. The Hearing Officer was directed to prepare and cause to be served upon the parties a report containing resolutions of the credibility of witnesses, findings of fact and recommendations to the Board as to the disposition of said issues. Accordingly, on June 8, a hearing was held before the undersigned Hearing Officer duly designated for the purpose of conducting the hearing. The Employer and Petitioner were represented at the hearing and had full opportunity to call, examine and cross-examine witnesses, to introduce evidence pertinent to the issues and to make statements in support of their respective positions.

I have made the Findings of Fact that follow based upon the entire record in this case⁴ and from a careful observation of the manner and demeanor of the witnesses while testifying under oath.⁵ After carefully considering those facts and the applicable

⁴ Permission was granted by the undersigned for the filing of briefs. The parties subsequently filed briefs, which I have duly considered in formulating my recommendations.

⁵ In the resolution of all issues for which the credibility of oral testimony becomes a factor, I have carefully considered the demeanor and conduct of the witnesses, as well as their candor, their objectivity and their bias or lack thereof. I have also carefully weighed the witnesses' understanding of the matters to which they have testified, as well as whether parts of their testimony should be accepted when other parts are rejected.

law, I recommend to the Board that the challenges to the ballots of Douglas Delzer, Michael Heimerl and Joseph Prehall be sustained.

Findings of Fact

The Employer commenced operations in about January 2002. It replaces and repairs outside lighting located on elevated poles in parking lots and on wall packs on the sides of buildings. Its customers include banks and mortuaries in the metropolitan area. The Employer's president is Joseph Brady, and its unpaid manager, since October 2003, is his brother, John Brady.

Challenges of Douglas Delzer, Michael Heimerl and Joseph Prehall

The Board Agent conducting the election challenged the ballots of Douglas Delzer, Michael Heimerl and Joseph Prehall as their names were not on the eligibility list. The Employer contends that Delzer, Heimerl and Prehall were laid off and do not have a reasonable expectancy of recall. The Petitioner contends that the three do have a reasonable expectancy of recall.

Douglas Delzer and Michael Heimerl were hired as journeymen electricians and Joseph Prehall was hired as a laborer.⁶ John Brady testified that he believed that Delzer was hired in December 2003, Heimerl in January and Prehall a couple of days before his layoff. Brady thought that Delzer, Heimerl and Prehall were laid off the end of January/first part of February. The date was later established to be February 19.

Legal Standard

In determining whether laid off employees are eligible to vote the Board's test is whether, based on objective factors, they have a reasonable expectancy of

⁶ Prehall is a journeyman electrician but was hired by Joseph Brady as a laborer and understood he would be working in that position for a couple of weeks as the Employer did not have enough laborers.

reemployment in the near future. See Higgins, Inc., 111 NLRB 797 (1955). In MJM Studios of New York, Inc., 338 NLRB No. 147 (2003) the Board stated that “The determination of eligibility is based on circumstances extant at the time of the payroll eligibility date and the date of the election.” The objective factors to be analyzed, as cited in Apex Paper Box Co., 302 NLRB 67 (1991) are: the employer’s past experience of layoff and recall, future plans, the circumstances surrounding the layoff and what the employees were told about the likelihood of recall. The party seeking to exclude a challenged individual from voting has the burden of proof to establish that the individual is not eligible. See MJM Studios of New York, Inc., supra. In the instant case, the burden belongs to the Employer.

Therefore, in order to determine whether Delzer, Heimerl and Prehall, all of whom were laid off on February 19, are eligible voters I will examine whether they had a reasonable expectation of recall as of the payroll eligibility period on March 14 and as of the date of the election on April 19.

Employer’s Past Experience of Layoff and Recall

At the time of the hearing, John Brady testified that the Employer employed two laborers named Roberto and Rafael (no last names provided) and that they had been with the Employer at least since October 2003. The Employer also subcontracts with two master electricians named Joe Ujue and Jerry Gardas to perform electrical work. The Employer’s relationship with Ujue goes back about one and one-half years, and after the layoffs of Delzer, Heimerl and Prehall, Ujue continued to perform electrical work for the Employer. The Employer’s relationship with Gardas began about five to six weeks before the hearing in the instant case. After the three employees were laid off,

laborers Roberto and Rafael continued to work with the two subcontractors. John Brady testified that an electrician he identified only as Mike was let go in December 2003 and another unidentified person that same month or January because of performance issues. Additionally, employees Travis Gast and Aaron Olson were laid off about one week prior to the layoffs of Delzer, Heimerl and Prehall. No record evidence was presented which indicated that the Employer has ever recalled any employee it has laid off.

Summary and Conclusion Regarding the Past Experience Factor

The record evidence does not establish that the Employer has recalled anyone that it has laid off, so the evidence concerning this factor does not tend to prove or disprove that Delzer, Heimerl or Prehall had a reasonable expectancy of recall in the near future.

Employer's Future Plans

John Brady testified that a breakfast meeting was held to introduce new employees, including Joseph Prehall, to their co-workers and also to mention the Employer's hope for new business, including General Mills, 3M and Medtronics.⁷ Michael Heimerl, called by the Petitioner, testified that this meeting was on the morning of February 10, and he remembers that it was mentioned there were 60-70 work orders backed up and the Employer had just obtained an account with Medtronics. Brady indicated that in connection with mentioning potential new business he is by nature an optimistic person, and ". . . I was not painting anything in a negative manner especially

⁷ At the time of the hearing Brady said that at the end of February the Employer obtained only one small job for Medtronics at one of its numerous locations.

to new employees.” Brady also indicated he did not remember mentioning a specific number of outstanding work orders.

Joseph Prehall, also called by the Petitioner, testified that on an unspecified date one of the Bradys – he was not specific -- indicated that the Employer would like Prehall to be included in its group of core employees as it expected an increase in work and was contemplating expanding into other states.

John Brady reported that since the first of the year, the Employer has obtained one Byerly’s location as a test, and one AmericInn facility, but has lost the business for CSM and for several Taco Bell locations. When questioned as to the percentage of business that CSM provided the Employer, John Brady indicated that the Employer does not possess good records on such things, but that CSM was “significant” but he could not say if it was 5 percent of the Employer’s business or 20 percent.

Summary and Conclusion Regarding the Future Plan Factor

The evidence establishes that the Employer was clearly hopeful that it would obtain additional large commercial accounts, even to the point of specifying the names of potential customers to employees. However, uncontroverted Employer testimony establishes this did not occur, and in fact the Employer even lost some accounts since the beginning of 2004. Therefore, I conclude that the evidence concerning this factor does not tend to prove or disprove that the laid-off employees had a reasonable expectancy of recall in the near future.

Circumstances Surrounding the Layoffs

Joseph Brady testified that he notified Delzer, Heimerl and Prehall of the layoff at the Employer’s office early one morning when they were all together. He told them the

reason for the layoff was because the Employer did not have a master electrician employed as an employee and it was required to do so, and also that there was not enough work.

Petitioner witnesses Douglas Delzer and Michael Heimerl testified that Joseph Brady telephoned them separately in the evening to notify them of the layoff⁸ and that the reason given was because the Employer did not employ a master electrician. Joseph Prehall testified that he was not contacted by either Joseph or John Brady, but instead heard about the layoff from co-worker Heimerl.

According to John Brady, Delzer, Heimerl and Prehall were laid off the day after the Employer learned from the Minnesota State Board of Electricity that it was required to have a master electrician employed as an employee and it did not. As the Employer had been operating under the assumption that its practice of having a master electrician as a subcontractor was sufficient, the layoff was necessary because the Employer could not legally perform electrical work. The Employer also learned that the State required that it be licensed as an electrical contractor and to be bonded, which it was not. The Employer did not cease operations altogether, but rather ceased having its employees perform electrical work and instead relied on subcontractors to do that work.

According to Joseph Brady, the reason he did not request that the three laid off employees return the Employer-provided cell phones and gas credit cards was due to a "confrontation" he was involved in with employee Travis Gast, who had been laid off prior to the layoffs of Delzer, Heimerl and Prehall. Brady said that Gast brought the phone back in pieces, did not return the credit card and when requested to do so told

⁸ On rebuttal Joseph Brady testified he could have contacted the employees by phone at night, but that he could not remember.

Brady he wanted him to meet with Petitioner Organizer Robbie Crofoot. John Brady testified that it was a bad business decision to fail to request that the employees return the items, but notes that the Employer paid only for the use of the phones and the phones themselves were evidently free.

Summary and Conclusion Regarding the Layoff Circumstances Factor

It appears that the Employer hired employees on an as-needed basis, depending on the volume of its business. Delzer, Heimerl and Prehall were laid off on February 19 because the Employer could not operate legally as it did not have a master electrician employed as an employee and was not licensed and bonded as an electrical contractor. After the three were laid off, the Employer continued to perform electrical work using the subcontractor it had been using in the previous one and one-half years. By the time of the payroll eligibility date of March 14 and by the election date of April 19 the Employer had not hired a master and was not licensed and bonded – both preconditions to recalling employees. The testimony of the employees that the Employer failed to ask for its phones and credit cards back could support a claim that the employees did have a reasonable expectancy of recall, but on the other hand the Employer testified the reason it failed to ask for those items back was that it wanted to avoid a confrontation.

I conclude that the evidence concerning this factor tends to prove that the employees did not enjoy a reasonable expectancy of recall in the near future because it would be speculative to conclude that as of the relevant time periods the Employer would soon, if ever, be able to recall the three employees.

What the Employees were Told About the Likelihood of Recall

According to Joseph Brady, he did not tell the laid off employees when the Employer might be able to recall them, but did indicate it might take a while and he would keep the employees informed as to what was going on. Delzer testified that Joseph Brady also said that he wanted to call him back to work and on cross-examination when asked what Brady told him about when he might be recalled, Delzer indicated that Brady said it would be as soon as the Employer hired a master, but no time frame was given.

After the layoffs, John Brady testified that he telephoned Delzer, Heimerl and Prehall individually on a weekly basis for three or four weeks. Brady told them that the Employer had put an advertisement in the newspaper seeking a master electrician, but the Employer was disappointed in the quality of applicants and it was going to take a long period of time. Brady also told the three that since the Employer would need to first employ a master electrician before it employed a journeyman electrician, the Employer did not know how long the process to hire a master would take or even if the Employer would be successful in hiring a master. When asked why Brady contacted the laid off employees, he testified that it was important to do so as the employees had done good work and he wanted to keep them “. . . abreast of the situation – where we were and what was happening, you know, what the outcomes might be.” In response to a question as to whether he gave the employees assurances about when they might be recalled, Brady testified that he did not, and that he told the three he did not know when, or even if, they would be rehired. In response to a leading question as to whether he

told the three they needed to keep their options open and look for other opportunities Brady responded affirmatively.

Delzer denied that John Brady told him that the Employer did not know if it would hire a master, but rather testified that Brady said he did not know how long it would take to hire a master. Heimerl testified that when John Brady called him he indicated that the Employer was looking for a master electrician and that they would be back to work as soon as a master was hired. Heimerl further testified that in the two subsequent conversations he had with Brady, as well as in the one phone message Brady left for him that Brady's message was that the Employer was still looking for a master.

Prehall testified that in his first telephone call from John Brady that he was told that the Employer was looking for a master electrician and they would have to wait until a master had been hired to go back to work. During cross-examination, Prehall indicated that Brady said the Employer had not been successful in hiring a master electrician but he would keep Prehall informed as to when the Employer was able to hire one. Prehall testified that Brady referred to him being the last employee hired⁹ and “. . . that I would be the last one called if nobody – but he said depending on who came back, he says I will call you back.” During Brady's first telephone call, Prehall offered to return the Employer-provided phone, business cards and a key to Brady, but Brady declined and told him to keep those items because Prehall would need them when he came back to work. When asked whether this happened, Brady initially testified that he did not recall Prehall mentioning those items, and then said he did not believe Prehall brought the subject up.

⁹ Prehall estimated he worked for the Employer six or seven days, with his first day of employment being on about February 9 and his last being February 19.

John Brady remembered that in his separate conversations with Prehall and Heimerl that the two indicated they would be willing to take the master electrician's examination and that Brady encouraged them to do so for themselves, not for the Employer's situation. Prehall testified that Brady told him to get a master's license in order to further his education. Heimerl's testimony indicates that Brady only said it would be a good idea for him to take the master's test.

John Brady recalled that when he spoke with Prehall that Prehall mentioned getting another job and asked if Brady would write a letter of recommendation for him. During cross-examination Prehall denied speaking with John Brady about a letter of reference in order to seek other employment. However, Brady was adamant that Prehall asked him about a letter of recommendation. Brady also testified that he provided Prehall with unspecified assistance when Prehall was seeking unemployment compensation, that he thinks he also assisted Heimerl but does not recall if he assisted Delzer. Prehall and Delzer denied receiving any assistance from John Brady with regard to filing for unemployment compensation and Delzer testified that he never even spoke with Brady about the topic. Heimerl also testified that John Brady never spoke with him about unemployment compensation.

According to John Brady, he ceased telephoning Delzer, Heimerl and Prehall when he received an unfair labor practice charge alleging the layoffs of the three to be unlawful.¹⁰ Brady testified that after he received a faxed copy of the charge from his

¹⁰ Employer Exhibit 1, which is Case 18-CA-17222 filed on March 11 and served on the Employer and the Employer's counsel by letter dated March 12.

counsel's office on March 16¹¹ he ceased calling the three employees because he was concerned that any statements made by him might lead to the filing of additional unfair labor practice charges.¹² In response to a leading question John Brady testified that he assumed he quit calling the employees sometime during the week prior to March 16.

Summary and Conclusion Regarding Recall Likelihood Factor

The testimony of the Employer as to what it told the employees about the likelihood of recall differs from the testimony of employees as to what they were told. The Employer contends that in addition to telling employees that it was looking for a master electrician to hire and that it did not know how long it would take, it also told the employees that it was uncertain that it would be successful in finding a master electrician for hire. The employees agree that the Employer indicated it was looking for a master electrician to hire and did not know how long it would take, but deny that the Employer said it was uncertain as to whether it would even hire a master electrician. However, there is no dispute that the Employer never mentioned a specific time period, such as days, weeks or months, by which time it would recall the employees.

It is unnecessary to resolve these differences in testimony, because even crediting the employees' version that the Employer did not say it was unsure whether it would even hire a master, we are still left with vague and speculative statements about what may possibly happen at an unknown point in the future. Therefore, I find that the

¹¹ No testimony was elicited as to when the Employer received a copy of the charge which was served on it by the Regional Office.

¹² John Brady did confirm that Employer Exhibit 1 was not the only unfair labor practice charge filed against the Employer. I take official notice of the two other unfair labor practice charges filed against the Employer by Petitioner: 18-CA-17214 filed on March 8 alleging the Employer unlawfully terminated Travis Gast and Aaron Olson and 18-CA-17246 filed on April 2 alleging that the Employer unlawfully failed to recall Delzer, Heimerl and Prehall. All three unfair labor practice charges were withdrawn on May 14.

evidence concerning this factor tends to prove that the employees lacked a reasonable expectancy of recall in the near future. See Sol-Jack Company, 286 NLRB 1173 (1987).

While in its post-hearing Brief the Petitioner contends that anti-union animus was behind the Employer's failure to recall the three employees, there is no finding of such by the Region, and no one asserted that a complaint was issued in either the charge alleging the three layoffs to be illegal or in the charge alleging the failure to recall the three employees to be illegal. I cannot make a finding that the Employer was converting a temporary layoff to a permanent one for unlawful reasons. See Sol-Jack Company, supra.

In considering the evidence presented concerning the four factors and the record as a whole, the evidence concerning the first two factors considered by the Board – past practice of layoff and recall and the Employer's future plans – neither tends to prove nor disprove whether the three employees had a reasonable expectancy of recall. The evidence concerning the third factor – the circumstances of the layoffs – establishes that the employees were laid off because the Employer could not legally continue to operate as it had in the past. Since the Employer's efforts to cure this problem had been unsuccessful and because the record evidence provides no basis for concluding the Employer was likely to do so in the near future, I conclude that the evidence concerning this factor strongly supports the conclusion that the employees had no reasonable expectancy of recall. Finally, the evidence concerning the fourth factor – what the employees were told about the likelihood of recall – is not entirely consistent as to whether the Employer specifically told employees that it was unsure whether it

would ever be successful in hiring a master electrician, a condition necessary for it to legally operate. All of the witnesses agree, however, that the Employer made no definitive statements concerning the timing or likelihood of recall. For this reason, I conclude that the evidence concerning the fourth factor also strongly supports the conclusion that the employees had no reasonable expectancy of recall in the near future.

Since the evidence concerning the first two factors is inconclusive and the evidence concerning the third and fourth factors strongly supports the conclusion that the employees lacked a reasonable expectancy of recall in the near future, I conclude that the Employer has satisfied its burden of establishing that they should be excluded from eligibility to vote. Accordingly, I find and conclude that Douglas Delzer, Michael Heimerl and Joseph Prehall did not enjoy a reasonable expectancy of recall as of the payroll eligibility date or as of the date of the election.

Conclusion and Recommendation

In view of the foregoing findings of fact and after carefully considering all of the evidence in the record, I recommend that the challenges to the ballots of Douglas Delzer, Michael Heimerl and Joseph Prehall be sustained and that a revised Tally of Ballots and appropriate Certification be issued.¹³

¹³ As provided in Section 102.69 of the Rules and Regulations of the National Labor Relations Board, Series 8, as amended, within 14 days from the date of issuance of this report, any party may file with the National Labor Relations Board, addressed to the Executive Secretary, 1099 – 14th Street NW, Washington, DC 20570, an original and seven copies of exceptions thereto. Immediately upon the filing of such exceptions, the party filing same shall serve a copy thereof on the other parties and shall file a copy with the Regional Director and a Statement of Service shall be made to the Board simultaneously therewith.

Dated at Minneapolis, Minnesota this 2nd day of July, 2004.

Susan M. Shaughnessy, Hearing Officer
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STATEMENT OF SERVICE

I hereby certify that on July 2, 2004, copies of this Report were served by U.S. Mail or in person, on the parties whose names and addresses are listed below:

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